NO. 82-2046

AUG 6 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED TRANSPORTATION UNION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, *et al.*,

Respondents,

and

CONSOLIDATED RAIL CORPORATION,

Rule 19 Party.

On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

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Counter-Statement of Question Presented

Whether the Special Court, Regional Rail Reorganization Act, properly upheld the decision of a neutral referee, pursuant to 45 U.S.C. §588, that employees electing to transfer to the Consolidated Rail Corporation (Conrail) shall have no further right to return to employment with a commuter authority, where the statute provides for a right to transfer to Conrail but is silent on any further right to transfer to a commuter authority.

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On Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973

BRIEF IN OPPOSITION

Counter-Statement of the Case

This is the third time this matter comes before the Court on a Petition for a Writ of Certiorari to the Special Court, Regional Rail Reorganization Act of 1973. The instant petition was filed on behalf of the petitioner below, the United Transportation Union ("UTU"), to review the May 25, 1983, Order of the Special Court dismissing paragraphs

16 (a), (b), (c) and (d) and 18(b) and (c) of the UTU's Petition for Review challenging a portion of implementing awards, made pursuant to 45 U.S.C. §588(d), for the transfer of employees from the Consolidated Rail Corporation (Conrail) to respondents NJ Transit Rail Operations, Inc.[1] (NJTRO), and Southeastern Pennsylvania Transportation Authority (SEPTA). Paragraph 16 of the Petition for Review sought relief against SEPTA, while paragraph 18 sought relief against NJTRO. This brief is submitted on behalf of respondent NJTRO in opposition to the UTU's Petition for a Writ of Certiorari.

Paragraph 18(a) of the Petition for Review challenged the seniority roster established by the award of neutral referee Kasher, pursuant to §508(c)(5) of the Rail Passenger Service Act, for the transfer of employees from Conrail to NJTRO. 45 U.S.C. §588(c)(5). Paragraphs 18(b) and (c) challenged the same award because it does not contain a provision permitting former Conrail employees to move back and forth between NJTRO and Conrail after they make an initial choice between the two for employment after January 1, 1983. (Ra2).[2] Prior to the instant petition, this same matter was the subject of a Petition for a Writ of Certiorari by the UTU, petitioner below, from the Special Court's denial of a preliminary injunction with respect to paragraph 18(a) of the Petition for Review. *See United Transportation Union* v. *Southeastern Pennsylvania Transportation Authority*, 555 F. Supp. 1382 (Sp. Ct. R.R.R.A., 1983), *cert.* den. —— U.S. ——, 105 S. Ct. 1275 (1983). (UTU v. SEPTA). That Petition for Certiorari was denied in a March 7, 1983 or-

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[1] This is the legal name of respondent. The UTU improperly named respondent in its petition below, as did petitioner here.

[2] "Pa" refers to the Appendix attached to the Petition for a Writ of Certiorari. "Ra" refers to the Appendix attached to this brief.

der of this Court. *United Transportation Union* v. *Southeastern Pennsylvania Transportation Authority,* No. 82-1189.[3] Following that denial, Suzanne Woodard, a plaintiff before the Special Court, filed a Petition for a Writ of Certiorari of the February 9, 1983 final order of the Special Court dismissing paragraph 18(a) of the Petition for Review. That petition, in which petitioner UTU joined, was denied on June 20, 1983. *Woodard* v. *Southeastern Pennsylvania Transportation Authority et al.,* No. 82-6499.

In its latest petition, the UTU relies on the very same arguments previously rejected by this Court in denying the two earlier Petitions for Writs of Certiorari. Moreover, those arguments, which related to the seniority roster established by the neutral referee, are irrelevant to the Special Court's May 23, 1983, decision (Pa1), which is the subject of the instant petition. As it relates to NJTRO, the May 23, 1983, decision discussed only the alleged right of employees to transfer back and forth between NJTRO and Conrail after they make an initial election to be employed by NJTRO.

As this Court is aware from the previous petitions, this matter arises under certain provisions of the Northeast Rail Services Act of 1981 (NRSA) (Pub. L. 97-35, Title XI, §§1131-1168, August 13, 1981) amending the Rail Passenger Service Act to add §§508-510, providing for the transfer of employees from Conrail to commuter author-

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[3] Although at the time that Petition was filed, January 10, 1983, no final order had been entered by the Special Court with respect to ¶ 18(a) of the Petition for Review, the UTU's Petition dealt only with the merits of the action and did not address the other standards for consideration of preliminary injunctions. Moreover, the Special Court did enter its final order on February 9, 1983, dismissing ¶ 18(a), and this Court was so advised prior to its denial of a Writ of Certiorari.

ities. 45 U.S.C. §§588-590. These provisions were necessitated by another provision of NRSA relieving Conrail of any legal obligation to operate commuter service after January 1, 1983. 45 U.S.C. §744a. Prior to that date, Conrail had been required to operate commuter service under contracts with commuter authorities pursuant to §304 (c) of the Regional Rail Reorganization Act of 1973. 45 U.S.C. §744(c).

45 U.S.C. §§588-590 provided a three-step process for transferring employees from Conrail to commuter authorities. First, a factfinding panel was established to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." 45 U.S.C. §589. The second step was the negotiation of Implementing Agreements to determine the number of employees and to identify the specific employees to be transferred to commuter authorities. 45 U.S.C. §588. Those negotiations were to be held between commuter authorities and representatives of the various crafts or classes of employees of Conrail to be transferred to commuter authorities. If the negotiations did not result in an agreement by August 1, 1982, the dispute was to be submitted to a neutral referee for binding arbitration. 45 U.S.C. §588(d). The transfer of employees was to be completed by January 1, 1983. The final step in the process was the negotiation of a collective bargaining agreement with representatives of the crafts or classes to be transferred to the commuter authority. 45 U.S.C. §590.

The instant dispute arises out of the Implementing Agreement awarded by the neutral referee after NJTRO and the various unions representing employees to be transferred from Conrail to NJTRO were unable to reach an agreement pursuant to 45 U.S.C. §588. One of the neutral referee's tasks in determining the Implementing Agree-

ment for the transfer of employees from Conrail to NJ TRO, pursuant to that provision, was to:

> determine the procedure for determining the seniority of such employees in their respective crafts or classes in Amtrak Commuter or with a commuter authority which shall, to the extent possible, preserve their prior seniority rights . . . and ensure the retention of prior seniority on Conrail of employees transferring to Amtrak Commuter or a commuter authority and determine the extent and manner in which such employees shall be permitted to exercise such seniority.

45 U.S.C. §588(c)(5) and (7). After reviewing the language of 45 U.S.C. §588(c)(7) which requires only that transferred employees shall retain seniority rights "on Conrail", the neutral referee found that such employees are limited to a transfer back to Conrail and that, after they do so, they will have no right again to transfer to NJTRO. (Ra4). It is that portion of the neutral referee's decision that was challenged in paragraphs 18(b) and (c) of the Petition for Review before the Special Court and which is, therefore, the subject of the present Petition for a Writ of Certiorari insofar as it is applicable to NJTRO.

Paragraphs 18(b) and (c) of the Petition for Review were dismissed by the Special Court on the motion of NJTRO for expedited determination. After noting the limited scope of review provided for the neutral referee's award (Pa4), the Special Court found that the issues raised by petitioner were indistinguishable from the same claims raised and rejected by the Court in *United Transportation Union* v. *Metro-North* (*Commuter Rail Division of the Metropolitan Transportation Authority*), 554 F. Supp. 429 (Sp. Ct., R.R.R.A., 1983). (Pa7). (UTU v. Metro-North). In that case the Special Court found that

> it is clear that Congress intended Section 508 [45 U.S.C. §588] to provide for negotiation of a limited transfer back to Conrail

554 *F. Supp.* at 432. The Court found no right to transfer back to NJTRO. For that reason it dismissed paragraphs 18(b) and (c) of the Petition for Review.

Summary of Argument

Petitioner seeks review of an award of a neutral referee made pursuant to a statute, 45 U.S.C. §588, which grants broad discretion to the referee to prescribe a procedure for transferring employees from Conrail to commuter agencies. The scope of review of that award is extremely narrow, being limited to a determination as to whether the referee failed to comply with the law, acted outside his jurisdiction, or acted corruptly. The arguments made by petitioner challenging the award are without merit and do not raise an important question of federal law.

ARGUMENT

A Writ of Certiorari should not issue to review the decision of the Special Court.

Initially, it must be emphasized that the issue presented by this latest petition is wholly irrevelant to the May 23, 1983, Special Court decision of which review is sought. In fact, the petition reads as though it is still challenging the prior Special Court decisions which upheld the right of the neutral referee to make some changes in seniority by creating a new seniority roster. Thus petitioner continues to argue, as it did twice before, that a new seniority sys-

tem may not be implemented because the statute requires seniority to be preserved to the extent possible. However, because the seniority roster issue had been previously disposed of, the Special Court did not deal with it in its May 23, 1983, decision, which held only that employees would have no right to return to NJTRO, if they chose to leave that entity and return to employment with Conrail. Indeed, it was the second time the UTU had brought the "flow back" issue before the Special Court. The Court initially ruled against the UTU in *UTU* v. *Metro North, supra*, and reaffirmed its ruling in the May 23 decision, noting that the UTU had made no attempt to distinguish the case. In its instant petition, the UTU makes no attempt to explain the relevance of its seniority roster arguments to the "flow back" decision at issue.

In making its argument regarding seniority rights petitioner states that the matter involves an important issue of constitutional law, but merely argues that the Special Court decision conflicts with general rules of statutory construction. Assuming, for the purpose of argument, that the issue is relevant, it is clear that, in making its argument, petitioner has taken the phrase "to the extent possible," in 45 U.S.C. §588(c)(5), out of context, and has ignored language found in 45 U.S.C. §588(c)(7). Thus, it is petitioner that has ignored the rule of statutory construction that, in interpreting a statute, the court should "look to the provisions of the whole law and its object and policy." *Philbrook* v. *Glodgett,* 421 U.S. 707, 713 (1975).

In its petition to this Court, petitioner argues, as it did in its prior petition and as did intervenor Woodard in her Petition for a Writ of Certiorari, that the provision in 45 U.S.C. §588(c)(5), requiring the preservation of prior seniority rights "to the extent possible," requires the maintenance of precisely the same seniority rights that existed

with Conrail. That argument ignores the statutory framework. In this case the provision for an Implementing Agreement was a second step in the process prescribed in 45 U.S.C. §§588-590 "prescribing the method under which Conrail employees are to be absorbed by Conrail's successors." *New Jersey Transit Rail Operations, Inc.* v. *International Brotherhood of Boilermakers, etc.*, 550 F. Supp. 1327, 1328 (Sp. Ct. 1982). The Implementing Agreement follows the findings of the factfinding panel appointed pursuant to 45 U.S.C. §589, to recommend "changes in operating practices and procedures which would result in greater productivity to the maximum extent practicable." Further, 45 U.S.C. §590 provides for the negotiation of new collective bargaining agreements after the Implementing Agreements are reached. In so doing Congress intended that

> . . . existing Conrail agreements would not apply to Amtrak Commuter or to commuter authorities that chose to operate their own service.

Explanatory Statement, 97th Cong., First Sess., 127 Cong. Rec., S. 9062 (July 31, 1981). Thus, commuter authorities are not bound by seniority provisions in existing collective bargaining agreements. When the statute is read as a whole it shows that Congress intended the maintenance of existing seniority rights to be one, but not the paramount, goal to be achieved in designing the Implementing Agreement.

After reviewing the above cited statutory history and 45 U.S.C. §588(c)(5) in the context of all the provisions of 45 U.S.C. §§588-590, the Special Court has held that

> [t]he words "to the extent possible" in §508(c)(5) clearly contemplate that preservation of prior seniority rights is to be balanced against other considerations. . . . We find that Congress granted the neu-

> tral referees the discretion to determine the level of protection to be afforded to prior seniority rights.

UTU v. *SEPTA*, 555 F. Supp. at 1388. Clearly, petitioner's argument, were it relevant, is without merit. Equally clear is that the Special Court decision of May 23 is entirely consistent with the statute. In considering petitioner's claim that 45 U.S.C. §588 gives its members a right to move back and forth between NJTRO, Conrail and Amtrak, subsection (c) (7) must also be reviewed. That subsection contains a clear provision giving transferred employees one opportunity to transfer back to Conrail, but is silent on any further rights. In *UTU* v. *Metro-North, supra,* the Special Court recently discussed that provision and contrasted it to Section 1165 of NRSA.

> With regard to the legislative history of NRSA, which was prepared as part of the Omnibus Budget Reconciliation Act of 1981, the Conference Committee on Public Law 97-35 explained that Section 508 of RPSA:
>
> > . . . provide[s] generally for retention of seniority rights and the right to "bump" back *into Conrail* [emphasis in original] at least once every six months . . .
>
> Explanatory Statement, 127 Cong. Rec. H.5962 (daily ed., August 4, 1981) (emphasis added). *From the above statement it is clear that Congress intended Section 508 to provide for negotiation of limited transfer back to Conrail.* However, the above statement is also completely silent as to any right subsequently to transfer back to a commuter authority. At best, Section 508 is merely ambiguous. In contrast, in presenting Section 1165 of NRSA, the same Conference Committee stated that:

> Amtrak, Amtrak Commuter, and the Corporation will negotiate for the right of freight and passenger employees to move from any of these services to another every six months.
>
> Explanatory Statement, 127 Cong. Rec. H.5966 (daily ed., August 4, 1981). Thus, when these two statements are read together, it becomes clear that Congress, in enacting Section 508 of RPSA and Section 1165 of NRSA, envisioned two *different* [emphasis in original] "flow back" schemes depending upon the parties involved. Further, consistent with this interpretation, the Court is of the opinion that if Congress had intended Section 1165 of NRSA to apply to local commuter authorities, it would have so stated. (Emphasis supplied).

UTU v. *Metro North,* 554 F. Supp. at 432. In its Petition to this Court, the UTU again neither distinguishes nor attempts to dispute the persuasive reasoning of the Special Court. The statute is clear that employees transferred to NJTRO were not given a right to freely transfer between Conrail, Amtrak and NJTRO, but are limited to a one time opportunity to transfer back to Conrail.

In *New Jersey Transit Rail Operations, Inc.* v. *International Brotherhood of Boilermakers, etc., supra,* 550 F. Supp. at 1329, the Special Court recently discussed the standard for judicial review of an arbitrator's award pursuant to 45 U.S.C. §588. Recognizing that 45 U.S.C. §588 (d)(3) states that the award is to be "final and binding to the same extent as an award of an adjustment board under Section 3 of Railway Labor Act," the Special Court followed decisions of this Court stating the standard of review under that statute:

> Judicial review of arbitrators' determinations under that Act is very limited. In *Union Pacific Railroad Company* v. *Sheehan*, 439 U.S. 89, reh. den. 439 U.S. 1135 (1978), the Supreme Court held that in order to overturn such a decision there must be a showing either that the arbitrator failed to comply with the Act's requirements, failed to act within his jurisdiction or acted corruptly. 439 U.S. at 93.

The Court may not substitute its opinion for that of the referee. *Id.* at 1331. The above standard of review was used by the Special Court in finding that the referee had complied with 45 U.S.C. §588. In view of the broad discretion granted the neutral referee and the limited scope of review, the Special Court's decision finding that the neutral referee's award is consistent with the statute is clearly correct.

Because broad discretion was granted to the referee and the transfer process is a one-time event that will not be repeated, the issues raised by petitioner do not raise important questions of federal law so as to merit the granting of a Writ of Certiorari. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1954).[4]

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[4] Petitioners also argue in the instant Petition for a Writ of Certiorari that implementation of the new seniority system will have a discriminatory impact on minorities and will violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§1981 and 1983, and the Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution. However, the implementation of the new seniority system was not the subject of the May 23, 1983, Special Court decision but rather was the subject of the February 9, 1983, decision, to which the Court has already denied a Writ of Certiorari. Moreover, there is no evidence in the record that the denial of a right of employees to move back and forth between NJTRO and Conrail will have any discriminatory impact.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Portion of Petition of United Transportation Union for Review of Award of Neutral Referees Francis Quinn, Richard R. Kasher and Fred Blackwell

SPECIAL COURT
REGIONAL RAIL REORGANIZATION ACT OF 1973
SECTION 1153

Civil Action No.

UNITED TRANSPORTATION UNION,
Petitioner,

—against—

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY, NEW JERSEY RAIL OPERATIONS, INC.,
Respondents,

and

CONSOLIDATED RAIL CORPORATION,
Rule 19 Party

Petition Of United Transportation Union For Review Of Award Of Neutral Referees Francis X. Quinn, Richard R. Kasher, And Fred Blackwell Issued Pursuant To Section 508 Of The Rail Passenger Service Act As Amended By The Northeast Rail Service Act Of 1981 (NERSA)

• • •

Portion of Petition of United Transportation Union for Review of Award of Neutral Referees Francis Quinn, Richard R. Kasher and Fred Blackwell

18. The seniority provisions of the Kasher Award and Implementing Agreement are beyond the scope of the neutral referee's jurisdiction under Section 508 of RPSA in that they:

> (a) Created a Limited Order Selection List of UTU employees only for the initial purpose of going over to NJT. Once over, all prior seniority rights end and, contrary to Section 510, establishes a new type seniority system (dove tailed company-wide seniority). The Kasher award changes the seniority from job run to company run seniority, drastically changing and affecting the seniority of all transferring personnel in contradiction to the intent of NERSA. The award specifically directs that seniority prior rights will not be applicable after January 1, 1983;
>
> (b) Eliminate the prior seniority right of the employees to ebb and flow between NJT passenger and Conrail freight services;
>
> (c) Terminate all NJT seniority for some employees returning to Conrail.

All specifically prohibited and contraindicated by the Congress in Section 508(c)(5) and (7) of the RPSA, which subsections indicate that implementing agreements should protect prior seniority "to the extent possible" (5), and should insure the protection of prior seniority rights (7).

• • • •

Portion of Arbitration Opinion of Neutral Referee Kasher

IMPLEMENTING AGREEMENTS ARBITRATION
PURSUANT TO SECTION 508 OF THE RAIL
PASSENGER SERVICE ACT, AS AMENDED

In the Matter of an Arbitration Among

NEW JERSEY TRANSIT RAIL OPERATIONS, INC.

—and—

CONSOLIDATED RAIL CORPORATION

—and—

THE LABOR ORGANIZATION REPRESENTATIVES
OF THE INVOLVED CRAFTS AND CLASSES OF
EMPLOYEES

ARBITRATION OPINION AND AWARDS
OCTOBER 14, 1982

• • •

2. Flow-back

Section 508(c)(7)(A) seeks to ensure, for employees transferring to NJTRO, the retention of prior seniority on Conrail, and to determine *the extent and manner* in which such employees shall be permitted to exercise such sen-

Portion of Arbitration Opinion of Neutral Referee Kasher

iority in order to provide them *at least one opportunity every six month period* to exercise previous freight seniority rights on Conrail.

In this tribunal's Opinion the language underscored above, standing alone, is susceptible to two interpretations. However, when the language is read in juxtaposition with Section 1165 of the same statute (NRSA), which provides that Intercity Passenger Service Employees, who have seniority in both freight and passenger service, may negotiate for "the right . . . to move from one service to the other once each six-month period", it is our Opinion that Section 508 can properly limit NJTRO employees to one voluntary exercise of seniority back to Conrail. Accordingly, we have incorporated in the implementing agreements attached to this Opinion, as the Awards, such a provision. We have not established a date certain in the future for extinguishment of this one time voluntary exercise of seniority.

• • • •